

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

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UNITED STATES OF AMERICA,  
Plaintiff,

vs

Criminal Action  
No. 16-235

GREGORY BROWN,  
Defendant.

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Transcript of suppression/dismissal motion  
proceedings held on December 18th, 2019, United States District  
Court, Pittsburgh, Pennsylvania, before the Honorable David S.  
Cercone, U.S. District Court Judge.

APPEARANCES:

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Proceedings recorded by digital stenography; transcript  
produced by computer-aided transcription.

1 P R O C E E D I N G S  
23 (In open court.)  
45 THE COURT: Good morning. Please be seated.  
67 The court's convened in the case of United States  
8 versus Brown at CR-16-235. This is the time set for argument  
9 on a part of the defense motion to dismiss. The issue the  
Court would like to hear argued is whether or not the Bartkus  
exception to the dual sovereignty rule applies in this case.

10 Okay?

11 When we last met, we weren't sure that the dual  
12 sovereignty rule even still existed. The Supreme Court since  
13 then has ruled; we know it does exist. The question here is  
14 whether or not what happened in state court had such  
15 involvement from the Federal Government to basically render the  
state prosecution a de facto federal prosecution.16 The language of some of the cases that have dealt with  
17 this issue say that the exception, to the extent that it  
18 exists, is limited to the extraordinary situation in which one  
19 sovereign is so dominated, controlled or manipulated by the  
20 actions of the other that it does not act of its own volition.  
21 There's talk of the state prosecution being a sham prosecution  
22 for the Federal Government. So that's the issue that I would  
23 like to hear argument on here today.24 Who is going to argue on behalf of the defense?  
25

MR. NOVARA: Thank you, Your Honor. Michael Novara

1 and Samantha Stern from the Federal Public Defender's Office,  
2 here with David Fawcett from Reed Smith, representing  
3 Mr. Brown. And Samantha Stern will be arguing this issue  
4 today.

5 MS. STERN: Good morning, Your Honor.

6 THE COURT: Good morning. You may proceed.

7 MS. STERN: Your Honor, since the last hearing date  
8 there's actually been some evidentiary developments, so I would  
9 like to first present some evidence on this question before  
10 proceeding to argument.

11 THE COURT: All right. It does relate to this issue,  
12 though.

13 MS. STERN: Yes, Your Honor. I have a brief  
14 presentation, but solely on facts relevant to the Bartkus  
15 exception that we're discussing.

16 THE COURT: Fine.

17 MS. STERN: If Your Honor will indulge me for just one  
18 moment, though, I have a brief housekeeping matter from the  
19 last hearing date.

20 As Your Honor will recall, we presented evidence and  
21 argument concerning the broader issues in the motion to  
22 dismiss, and I just want to make sure that we have entered as  
23 exhibits matters that were discussed previously.

24 So specifically, Your Honor, in our motion to dismiss  
25 we have attached Exhibits A through R. At no point was there a

1 formal motion for admission of those exhibits. I'm sure we  
2 would disagree as to the relevance of those documents.

3 However, hearsay is admissible in this context. I'd move for  
4 admission of those exhibits so they can be considered by the  
5 Court in determining the issues on the motion to dismiss.

6 THE COURT: Any objection?

7 MR. SWEENEY: No, Your Honor.

8 THE COURT: We'll admit them.

9 MS. STERN: And, second, Your Honor, the transcripts  
10 from prior proceedings in this matter. Again, I understand  
11 there's disagreement as to the relevance and weight that those  
12 transcripts should be afforded; however, we previously provided  
13 paper copies of the transcripts from the PCRA proceedings and  
14 the nol pros hearings in state court. We would like to provide  
15 a copy of the 1997 trial transcripts in their complete form to  
16 the Court by disk. And so I would move for admission of the  
17 trial transcripts, specifically; that would be Exhibit S. And  
18 then the other transcripts that have been previously provided  
19 to the Court -- we could submit that the PCRA hearing  
20 transcript is Exhibit T and the nol pros hearing is Exhibit U.

21 THE COURT: I don't see the harm in admitting them.

22 Do you?

23 MR. SWEENEY: Your Honor, the only concern that we  
24 have is that these transcripts are so voluminous, if we're  
25 talking about the issues raised in the motion to dismiss and

1 specifically the Bartkus exception, there's just so much more  
2 information beyond what is relevant to that. At the same time,  
3 what I was going to propose to Your Honor is that the  
4 parties -- if this is going to be part of the record, all these  
5 transcripts, that the parties be given an opportunity just  
6 within the next, say, 30 days to submit proposed findings of  
7 fact and conclusions of law with specific citations to these  
8 transcripts. Because, if not, and the Court is -- finds itself  
9 having to read hundred and hundreds and hundreds of pages, that  
10 could delay things and involve the Court looking at things that  
11 really aren't relevant, even by the parties' own agreement as  
12 to what the Bartkus exception is.

13 So with that all being said, I don't have an objection  
14 to that; but I would just request that if the Court is going to  
15 take all of this information in, that we be given an  
16 opportunity to pinpoint for the Court the aspects of these  
17 exhibits that really are important to resolving the Bartkus  
18 issue.

19 THE COURT: I think that would be very helpful to the  
20 Court instead of having all of this -- all of these transcripts  
21 just entered into the record.

22 Do you agree?

23 MS. STERN: No objection to post-hearing briefing,  
24 Your Honor. We're only making them available in their complete  
25 form so that the Court has them available as a reference as we

1 cite various portions of the record and different parts of the  
2 pleadings submitted in this case. So I'll hand those up at  
3 this time.

4 THE COURT: So the Court will agree with the  
5 Government and ask that the parties -- how much time did you  
6 say?

7 MR. SWEENEY: We would just ask for 30 days,  
8 Your Honor.

9 THE COURT: Thirty days to submit post-argument  
10 briefing; and you also suggested that there be findings of fact  
11 and conclusions of law?

12 MR. SWEENEY: Yes, Your Honor.

13 THE COURT: So ordered.

14 MS. STERN: And that concludes my housekeeping  
15 requests for Your Honor. Thank you for indulging.

16 I'll now begin presenting what I believe -- what we  
17 believe are the relevant facts for Your Honor to consider in  
18 deciding the sole sovereignty question; and to that end I'm  
19 going to hand up a couple of different things. I have what are  
20 premarked as Exhibits AA through FF. I'm going to just provide  
21 two copies to the Court at this time which I'll be referencing  
22 throughout my presentation. I also have, Your Honor, a  
23 demonstrative exhibit -- it's a timeline -- simply as a  
24 reference for the Court. I'm handing up two copies.

25 THE COURT: All right.

1 MS. STERN: And I don't believe the Government has an  
2 objection to the admission of the exhibits I have just handed  
3 up, but I'll make reference to them as we go and --

4 MR. SWEENEY: That's accurate, Your Honor, we don't  
5 object.

6 THE COURT: Okay.

7 MS. STERN: So, Your Honor, I know you're -- there was  
8 quite a bit of presentation at the last hearing on the history  
9 of this case. I'm not going to go through, you know, every  
10 aspect of the history of this case. I'd just like to hit on  
11 the points that I think are relevant for this question before  
12 Your Honor.

13 THE COURT: Right.

14 MS. STERN: And so I will make reference to this  
15 timeline. However, that hearing was now two years ago, so I do  
16 apologize if I'm covering ground that is already known to the  
17 Court here.

18 Again, through the span of time beginning in 1995  
19 through 1996, Your Honor, as you're aware, state and federal  
20 agencies led by the federal agency, the ATF, conducted  
21 investigation of the fire at the Bricelyn Street home. In 1995  
22 it was agreed between the US Attorney's Office and the  
23 Allegheny County District Attorney that the case would be  
24 prosecuted in state court.

25 Your Honor, as evidence of that agreement, I've

1 submitted Defense Exhibit AA, which is a press release issued  
2 by then US Attorney David Hickton on November 4th, 2016. This  
3 was the time of the federal indictment in this case. However,  
4 it makes reference to the prior decision -- the prior joint  
5 decision to prosecute this case in state court, and I'll refer  
6 to -- Your Honor to the second paragraph in that press release  
7 that says: Federal and local investigators and prosecutors  
8 have worked cooperatively since the inception of the  
9 investigation of the -- after the fire occurred in 1995. Even  
10 though jurisdiction existed in both state and Federal Court, it  
11 was agreed between the Allegheny County District Attorney's  
12 Office and the United States Attorney's Office that the case  
13 would originally be brought in state court and a joint  
14 prosecution team from both offices would prosecute the case.

15 Sometime in 1995 or 1996 -- it's not clear, totally  
16 clear to the defense -- there was an agreement between these  
17 offices that Assistant United States Shaun Sweeney would be the  
18 attorney cross-designated to the state matter and that he would  
19 co-prosecute that case with then Assistant District Attorney  
20 Mark Clark. Fast forward --

21 THE COURT: With who?

22 MS. STERN: Mark Clark.

23 THE COURT: Who was he, the Assistant District  
24 Attorney?

25 MS. STERN: The Assistant District Attorney then on

1 the state matter. In 1997, as Your Honor will recall, this  
2 case did proceed to trial in state court. I won't get into too  
3 much of the details about who did what in the course of that  
4 trial. It's outlined in that timeline before Your Honor. But  
5 suffice it to say, Your Honor, these two attorneys very much  
6 shared the load.

7 Significantly as well, ATF served -- agents served as  
8 lead prosecutors -- lead science experts in this matter. They  
9 contributed quite a bit of resources to this state prosecution.  
10 They also created a reward fund, which is also significant just  
11 considering how many federal resources were brought to bear in  
12 that original state court trial.

13 I won't discuss the post-conviction litigation too,  
14 too much. I don't think it's as relevant, necessarily, for  
15 this question that Your Honor is concerned with today.  
16 However, suffice it to say federal and state lawyers were  
17 involved in those post-conviction proceedings. Federal and  
18 state agents were involved as witnesses in those proceedings.  
19 And that litigation, as Your Honor is aware, ultimately  
20 resulted in the vacatur of Mr. Brown's state court conviction.  
21 And that was based on a finding by the state court judge of  
22 misconduct by both state and federal actors there. Those  
23 charges were then reinstated and pending in state court.

24 And now we are brought to 2016, Your Honor. A few  
25 things were going on during this time period. There were

1 efforts by the prosecution to have the state court judge who  
2 was presiding in those PCRA proceedings recuse in that case.  
3 In addition, a motion was made to have that case dismissed on  
4 double jeopardy grounds. At that point, Your Honor -- and this  
5 is some of the evidence that's become available to us since the  
6 last hearing date -- a meeting took place on September 22nd,  
7 2016, between members of the United States Attorney's Office  
8 and representatives of the District Attorney's Office.  
9 Specifically, Your Honor, I would refer you to Exhibit EE.

10 Our understanding, Your Honor, is that these are  
11 handwritten notes from First Assistant United States Attorney  
12 Steve Kaufman from a meeting between --

13 THE COURT: Let me interrupt you for one minute.

14 MS. STERN: Sure.

15 THE COURT: How does what you're getting into right  
16 now, the decision to -- that ultimately resulted in the case  
17 being brought in Federal Court, how does that relate to the  
18 state case, the trial, and what happened during -- that led up  
19 to the Defendant's conviction? Isn't that after the fact?  
20 Doesn't that go more to a possible due process issue or  
21 vindictive prosecution I think you call it in your motion?  
22 Does that really go to a Bartkus issue?

23 MS. STERN: Your Honor --

24 THE COURT: In other words -- let me make it a little  
25 bit clearer. How does those events about this decision of what

1 happened -- I don't know if that's where you're going -- as to  
2 how the case ended up in Federal Court -- I believe the case at  
3 that time was back in the hands of Judge Williams. How does  
4 that go to whether or not the state case was, from the  
5 inception, fundamentally a federal prosecution?

6 MS. STERN: I would frame the issue slightly  
7 differently than how Your Honor just framed it. But I guess  
8 stepping back for a moment, why is what's happening in this  
9 span of time, 2016 'til today, relevant to this dual  
10 sovereignty question?

11 If Your Honor looks to the case law that we've cited,  
12 it clearly, in discussing both, you know, the history of those  
13 cases, there's always a look back at the first proceeding and  
14 there's always an examination of what happened in between and  
15 what's happening today. I think it's completely relevant  
16 because the dual sovereignty doctrine is based on the concept  
17 of federalism in our system. And the Bartkus exception needs  
18 to be applied in circumstances where that federalism system  
19 upon which the dual sovereignty doctrine is based breaks down,  
20 is no longer actually a reality; and that is exactly what's  
21 happened in the history of this case.

22 So when Your Honor analyzes this issue, you have to  
23 look to not only what occurred in state court, but what's now  
24 happening in Federal Court today to ask whether the lines of  
25 federalism have been so blurred throughout the history of these

1 proceedings so that applying the dual sovereignty doctrine, you  
2 know, really employs a fiction which is not the reality.

3                   So here we are arguing that the tools, specifically  
4 the use of cross designation in this case, not only then, but  
5 now today -- as Your Honor will note, seated before you is not  
6 only an Assistant United States Attorney, but also a Deputy  
7 District Attorney from the Allegheny County District Attorney's  
8 Office who has been specially designated as a Special Assistant  
9 United States Attorney in this case.

10                  THE COURT: Oh, I know. But there's a lot of  
11 authority out there that says that cross designation doesn't  
12 destroy dual sovereignty. It's not an uncommon occurrence.

13                  MS. STERN: What's uncommon, Your Honor --

14                  THE COURT: There are cases where there was exactly  
15 what you're talking about, cross designations of either an  
16 assistant state prosecutor helping or taking part in a federal  
17 case or vice versa, and the courts held that that didn't  
18 constitute a Bartkus exception. You know that, right?

19                  MS. STERN: Your Honor, the Government cites not a  
20 single case involving facts like ours where you have a  
21 co-prosecution team of the original case by both state and  
22 federal lawyers; and now in the second prosecution, now in  
23 Federal Court because we've shifted forums, also a team  
24 comprised of both a state and federal prosecutor.

25                  THE COURT: Zero plus zero still equals zero. I mean

1 if they're allowed to do it, if the -- if the authority is that  
2 cross designation doesn't break dual sovereignty, so now that  
3 they're doing it again, so what?

4 MS. STERN: Your Honor, we are getting into argument  
5 now. I'd ask that I can present some --

6 THE COURT: Okay, I'm sorry. I'm chomping at the bit.

7 MS. STERN: Just to make the record, but I understand  
8 Your Honor's concerns and I'll certainly address them in  
9 argument; but I'm not aware of a blanket rule that approves of  
10 the practice of cross designation and says that cross  
11 designation doesn't matter for the question of determining  
12 whether the dual sovereignty doctrine applies.

13 THE COURT: I'm not saying it's not relevant. I'm  
14 just saying that every case that I've read that involved cross  
15 designations of attorneys, you know, either a federal  
16 prosecutor's going in and taking part in a state prosecution or  
17 vice versa, I haven't read any cases where the courts have held  
18 that that is an exception to Bartkus. But -- but, of course,  
19 that's just -- I understand that's just one fact in your  
20 argument.

21 MS. STERN: Yes, Your Honor, and I'm prepared to  
22 address the existing case law on this whenever we discuss the  
23 legal arguments.

24 THE COURT: All right, sorry to interrupt you.

25 MS. STERN: No, that's all right.

1           So, again, we're talking about a meeting that occurred  
2 on September 22nd, 2016. We have handwritten notes from  
3 Steve Kaufman from that meeting. It appears from those notes  
4 that then United States Attorney, David Hickton, took part in  
5 that meeting and also Stephen Zappala, the District --  
6 Allegheny County District Attorney. And most significantly,  
7 Your Honor, I just draw your attention to five lines down --  
8 and I apologize because these notes are somewhat open to  
9 interpretation because the handwriting is not very neat. But  
10 they can correct me if they believe I'm wrong about what this  
11 says.

12           But five lines down it indicates: We will make Becky  
13 a SAUSA, S-A-U-S-A. So clearly there was discussion about  
14 making Miss Walker -- giving Miss Walker a SAUSA designation  
15 for purposes of the federal prosecution. There's also  
16 discussion about nol prosing the state charges and opting to  
17 prosecute Mr. Brown in Federal Court. Soon thereafter a  
18 federal indictment was issued in this case.

19           I've also submitted as an exhibit a portion of the  
20 Justice Manual -- that's Exhibit BB -- a portion of the Justice  
21 Manual or the US Attorney's Manual that's referred to as the  
22 Petite Policy. I would like to move for admission of this  
23 document into the record.

24           THE COURT: It's admitted.

25           MS. STERN: And specifically, Your Honor, I'm not

1 going to make reference to too many portions of this policy.  
2 It's relevant because this policy generally applies to cases  
3 where there is a prior federal/state prosecution and the  
4 United States is considering whether to indict federally.  
5 Specifically, three paragraphs down into that policy, it  
6 indicates: This policy precludes the initiation or  
7 continuation of a federal prosecution following a prior state  
8 or federal prosecution based on substantially the same acts or  
9 transactions unless three substantive prerequisites are  
10 satisfied.

11                 First the matter must involve a substantial federal  
12 interest. Second, the prior prosecution must have left that  
13 interest demonstrably unvindicated. And, third, applying the  
14 same test that's applicable to all federal prosecutions, the  
15 Government must believe that the Defendant's conduct  
16 constitutes a federal offense and that the admissible evidence  
17 probably will be sufficient to obtain and sustain a conviction  
18 by an unbiased trier of fact.

19                 THE COURT: But this isn't law.

20                 MS. STERN: No, Your Honor, but this policy is  
21 relevant to the decision to prosecute Mr. Brown federally  
22 following the state -- following the state proceedings in this  
23 matter. And I submit specifically it's the first of these  
24 three prongs that's relevant here. The United States would not  
25 have pursued a federal indictment in this case had they not

1 thought that this case involved a substantial federal interest.  
2 And that's the point for which I am offering the Petite Policy  
3 into the record.

4           In addition, the Petite Policy establishes that when  
5 there is a history of state prosecution, like in this case, the  
6 prosecution must be approved by the appropriate Assistant  
7 Attorney General. And so authorization would have been  
8 required in this case in order for the federal prosecution to  
9 follow the state prosecution.

10           The Commonwealth then moved to nol pros the state  
11 court case, as they had discussed in their September meeting.  
12 At that hearing there was a discussion about the benefits that  
13 federal prosecution would have for the Commonwealth -- for the  
14 Commonwealth, not the Federal Government. And that argument,  
15 Your Honor, in the context of the nol pros hearing was made by  
16 Deputy District Attorney Walker here. And in her capacity as a  
17 Deputy District Attorney, she made arguments about the benefits  
18 to the Commonwealth of the federal prosecution.

19           I'm referring now to Defense Exhibit FF. I'll refer  
20 Your Honor to Page 10, if you'll indulge me. This is  
21 Miss Walker addressing the Court, quote: To the extent that  
22 the Court would consider the basis of a federal indictment, the  
23 Commonwealth would note the following: That this prosecution  
24 has always been a joint effort. Back from 1995 when the fire  
25 first occurred and the three firefighters were killed, the ATF

1 was involved. Fire -- excuse me, federal agencies were  
2 involved based on federal jurisdiction. There has always been  
3 a recognition that the Federal Government had jurisdiction  
4 concurrent with our jurisdiction at the time. In 1997 when the  
5 trial occurred, in 1996 when charges were filed, there was, as  
6 Mr. Fawcett pointed out, discussion determining which is the  
7 better sovereignty or which was the more appropriate  
8 sovereignty to pursue the case. And at that time it was  
9 decided that state court was the more appropriate place to try  
10 the case.

11           Circumstances have certainly changed since then. In  
12 1996, despite -- regardless of the age of the Defendant, the  
13 Commonwealth had a mandatory life sentence. We no longer have  
14 that. Our potential sentences are roughly the equivalent of  
15 the state's term of years to life potential sentence. In  
16 addition, the federal prosecution provides the Commonwealth  
17 with evidentiary benefits. There are -- given that we are now  
18 having only Commonwealth versus Gregory Brown and no longer  
19 Darlene Buckner sitting here, there are evidentiary issues in  
20 terms of the motive for this crime that we will be able to get  
21 into evidence down in Federal Court that will likely be  
22 precluded here. So based on an evaluation of the evidence,  
23 that is certainly a factor that was considered.

24           Additionally, as indicated, many of the witnesses were  
25 from federal agencies. The Commonwealth has been advised by

1 supervisors within the ATF that the ATF would fight our efforts  
2 to subpoena several of their -- or certain of their agents  
3 should we proceed to -- in state court. Therefore, we will  
4 lose those witnesses, which would greatly hinder our ability to  
5 try the case, as would the loss of motive evidence.

6 Your Honor, this is significant because it is evidence  
7 that the Commonwealth considers this federal prosecution their  
8 prosecution, too. And I think that is absolutely relevant for  
9 Your Honor to consider in determining whether or not the  
10 federalism system upon which our system is based has so broken  
11 down that we have to apply an exception to the dual sovereignty  
12 doctrine here.

13 In 2016, Your Honor, Miss Walker's office did follow  
14 through on authorization of her to be a SAUSA for purposes of  
15 this case only, which was also approved by the United States  
16 Attorney's Office. Since the last hearing in this matter, we  
17 have obtained documentation regarding that SAUSA authorization  
18 process. I'm referring Your Honor now to Exhibit CC, which are  
19 a portion of the SAUSA appointment-related documents that we  
20 have obtained from the Government in this case.

21 Specifically referring you to an e-mail on the second  
22 page, we got it from this -- that this process of initiating  
23 the SAUSA appointment took place beginning in September of  
24 2016. She was ultimately approved as a SAUSA in October of  
25 2016. This was approved by both her office and the United

1 States Attorney, and the appointment has since been extended in  
2 2017.

3 I would also point Your Honor to Defense Exhibit DD,  
4 which is additional documentation we've received from the last  
5 hearing date. This, Your Honor, is correspondence between  
6 Elizabeth DeLosa, who is an attorney with the Pennsylvania  
7 Innocence Project and the Office of the District Attorney.  
8 Your Honor might be wondering what relevance does this possibly  
9 have in this case. As Your Honor is aware --

10 THE COURT: I kept my mouth quiet.

11 MS. STERN: Ha-ha-ha.

12 Following the last hearing date, efforts were made by  
13 the defense to obtain more information about the unique  
14 relationship between these two offices throughout the life of  
15 these proceedings. Your Honor will recall litigation on our  
16 motion to compel, seeking documents relating to the facts that  
17 we considered to be relevant for the dual sovereignty doctrine.  
18 Why were these cases prosecuted jointly then? Why are they  
19 being prosecuted jointly today?

20 We did obtain some documentation. There was other  
21 documentation upon which the Government was asserting  
22 privilege. We asked Your Honor to ultimately grant us a motion  
23 to compel the production of those documents, and that was  
24 ultimately denied.

25 So one course that was taken in the course of that

1 time period was an effort to get the state to provide some  
2 documentation about just how common is this, this cross  
3 designation by these offices in the form of a Pennsylvania  
4 right-to-know request. And so the first two pages of  
5 Exhibit DD delineates Miss DeLosa's request for various  
6 records -- primarily, Your Honor, any records pertaining to  
7 cross designations from January 1990 until today. Okay? And  
8 so that would include cross designations where an Assistant  
9 District Attorney was authorized to be a Special Assistant  
10 United States Attorney and, secondly, in situations where an  
11 Assistant United States Attorney was designated to be a Special  
12 Assistant District Attorney in a state court matter.

13 What's interesting about this is that ultimately the  
14 District Attorney's Office only produced documentation  
15 concerning one SAUSA designation in the last 30 years. So I  
16 think that is significant. The case there is unrelated to this  
17 case. But certainly if this were a procedure that was employed  
18 all the time, and we're talking specifically about --

19 THE COURT: I know from one personal experience -- it  
20 goes back to the 1950s. My uncle, Judge William Cercone, who  
21 served as precedent judge of the Pennsylvania Superior Court,  
22 was an Assistant District Attorney and was named a special  
23 federal prosecutor to prosecute Steve Nelson, the head of the  
24 Communist party in western Pennsylvania. So we know -- I know  
25 it took place back in the 1950s anyway.

1 MS. STERN: So there's another one.

2 Your Honor, and I think, you know, this is really  
3 argument at this point, but just the point of entering this  
4 document into evidence is just -- you know, we have seen so  
5 many permutations now of these cross designations, okay? We  
6 have a special task force, we have -- you know, we regularly  
7 see special Assistant United States Attorneys appearing in  
8 Federal Court. They take on, you know, really a full -- a full  
9 Assistant United States Attorney caseload. Sometimes they  
10 ultimately become Assistant United States Attorneys, they  
11 get -- they are hired by the office.

12 What we're talking about here and what is unique is  
13 when someone employed by one prosecutor office gets  
14 authorization to work on one case down the street. And that's  
15 because that case is considered to be very important to that  
16 office and they want to maintain control over the case. The  
17 only way to maintain control is to have their attorney down the  
18 street prosecuting the case. And so that is what I am  
19 submitting is rare. Miss DeLosa -- the response to  
20 Miss DeLosa's record request supports that. I offer it into  
21 evidence at this time as Exhibit DD.

22 So now we're here in Federal Court, Your Honor, and at  
23 the Government's table we have Assistant United States Attorney  
24 Shaun Sweeney and Deputy District Attorney, Special Assistant  
25 United States Attorney Rebecca Walker co-prosecuting this case.

1 I'll just note for the record that at this last hearing, which  
2 was now approximately two years ago, this Court inquired  
3 about -- with Miss Walker regarding her role in this case. And  
4 she responded, quote: I am a Deputy District Attorney employed  
5 as a Deputy District Attorney with the Allegheny County  
6 District Attorney's Office. I have been granted the status of  
7 a Special Assistant United States Attorney for purposes of this  
8 case only. That's on Page 6 of the transcript from our last  
9 hearing day.

10           I'll save the rest for argument, Your Honor, but this  
11 case is very unique in that you have joint federal and state  
12 investigation, joint federal and state decisions regarding  
13 forum, then and today, and, third, and finally, and I submit  
14 most significantly, you have record involvement, co-prosecution  
15 teams by both the federal and state prosecutors in both the  
16 state and the Federal Court proceedings. This is a truly  
17 unique situation.

18           And I'll reserve the rest for argument.

19           THE COURT: Who is going to argue? Miss Walker?

20           MS. WALKER: Good morning, Your Honor.

21           THE COURT: Good morning.

22           MS. WALKER: May it please the Court, Rebecca Walker  
23 on behalf of the Government. We don't have any additional  
24 exhibits or evidence to introduce, so we would be prepared to  
25 go to argument at this point.

1           I believe that it would be -- the defense would  
2 proceed first as they have the burden of establishing prima  
3 facie evidence that there was a violation of the dual  
4 sovereignty here.

5           THE COURT: Very well.

6           MS. STERN: I'm happy to proceed first.

7           THE COURT: Very well, thank you.

8           Before we hear argument, something that Miss Walker  
9 just said made me think about something. The standard of proof  
10 in this case -- and I did read many cases dealing with this  
11 Bartkus exception, and it didn't appear to be perfectly clear  
12 to me what the actual standard of proof is. So can we agree  
13 that the standard is that the moving party, the defense, has  
14 the burden to establish a prima facie case and then the burden  
15 switches to the Government? Is that agreed upon?

16           I mean I know there was authority that said exactly  
17 that, but there was some other authority that it wasn't so  
18 clear. And then when the burden does switch to the Government,  
19 what is that standard, preponderance of the evidence?

20           MS. WALKER: I believe the authority -- unfortunately  
21 the name of the case escapes me at this time, but I believe  
22 we're talking about the same authority -- indicated that the  
23 Government would then have the burden of persuasion.

24           THE COURT: Very well.

25           MS. STERN: We don't have an objection to that

1 framework. That is consistent with some of the research I have  
2 done in this case, although it's not a clearcut issue, as  
3 Your Honor indicated.

4 THE COURT: Yes, it wasn't. That's exactly it. And  
5 that was an issue I was going to raise; but since we're pretty  
6 much all on the same page, that's fine. Okay.

7 MS. STERN: Your Honor, as the District Court  
8 recognized in the United States versus Belcher case, which the  
9 parties have cited in their briefings, quote: The unique  
10 concept of dual sovereignty arises from the federal system  
11 under which state governments and the Federal Government  
12 co-exist. This quote does not contemplate the uniting of these  
13 awesome powers.

14 In Bartkus, Your Honor, the United States  
15 Supreme Court envisioned a scenario where the concepts of  
16 federalism were so blurred, so undermined that the application  
17 of the dual sovereignty doctrine which normally applies in  
18 double jeopardy analysis wouldn't apply. This Court was not  
19 dealing with such a situation in Bartkus, as that case involved  
20 more of a classic successive prosecution scenario. And the  
21 Court recognized there that those prosecutions, investigations  
22 were, quote, separately conducted.

23 Fast forward to the Belcher case, which I believe is  
24 the most instructive for Your Honor in analyzing this question.  
25 That case involved the pooling of the power of both the federal

1 and state governments into a single lawyer who acted on both  
2 sovereigns' behalf. Specifically, one lawyer, who worked as a  
3 district attorney and a federal prosecutor in the life span of  
4 a case. And I'll highlight for Your Honor when the Court  
5 analyzed the Bartkus exception in that case, it considered how  
6 he was acting in the context of the state prosecution and then  
7 how he acted in the context of the federal prosecution as well  
8 because both of those sets of facts were relevant for  
9 determining whether or not that federalism underpinning had  
10 been undermined by the circumstances of the case.

11 In applying the Bartkus exception there, the  
12 District Court held that the exception, quote: Is best  
13 understood and applied in a situation where the principles of  
14 federalism are blurred and the power of centralized government  
15 works to deprive a citizen of fundamental rights. Any time  
16 we're talking about the Bartkus exception, we are talking about  
17 interpreting dicta from a Supreme Court decision from long ago;  
18 and that's difficult for Your Honor, it's difficult for the  
19 parties. I submit that the most helpful construction of the  
20 exception and how it actually operates is provided by this  
21 Court that actually applied it to -- under real facts rather  
22 than the imagined facts that the Bartkus court was working  
23 with.

24 And so that sham and cover language that Your Honor  
25 pointed to earlier I really don't think fully captures what

1 this exception is meant to address. And, of course, they  
2 couldn't anticipate, right, the various ways that state and  
3 federal governments might work together and depart from our  
4 sort of traditional federalism model. But the Belcher  
5 construction is really helpful for understanding how we might  
6 actually apply that concept.

7 And the circumstances presented here are very similar  
8 in key ways to what was presented in the Belcher case. The  
9 intricate involvement of both state and federal agencies and  
10 prosecutors throughout the life of this case -- we could go on.  
11 There was deep involvement by ATF, many resources thrown into  
12 the investigation and the prosecution by that office.

13 But I think there are two critical and distinguishing  
14 features that -- Your Honor may disagree, and I'm happy to talk  
15 with you about why you disagree -- but I think they are  
16 ultimately the distinguishing features that really compel  
17 application of the exception in this context, the first being  
18 that both in the 1997 trial and today we have prosecution teams  
19 comprised of lawyer representatives from both the District  
20 Attorney's Office and the United States Attorney's Office. I  
21 have not seen them cite to a single case where that dynamic  
22 exists and where the Court declined to apply the Bartkus  
23 exception.

24 Second, the decisions regarding forum, both in 1995  
25 and now, today, those decisions were clearly, as a matter of

1 record, made jointly by representatives of the US Attorney's  
2 Office and representatives of the District Attorney's Office,  
3 who agreed when they made the decisions about forum that they  
4 were both going to be represented by lawyers from their offices  
5 in the course of those proceedings. Those decisions about  
6 personnel and dedicating valuable prosecutorial resources to  
7 these prosecutions, those were made in the context of those  
8 forum choices. That is also very unique in this case. Not a  
9 single case cited by the Government deals with that type of  
10 dynamic which is present here.

11 Your Honor, if the Government's exception of dual  
12 sovereignty were correct in this case, then even following  
13 today's prosecution now in Federal Court with lawyer  
14 representatives from both the state and Federal Government --  
15 let's say Mr. Brown is acquitted at trial. Under their  
16 conception, Your Honor, at that point they can simply go back  
17 down the street -- the same players from both the state and  
18 federal offices can simply then go back down the street after  
19 this man has been acquitted in Federal Court and they can retry  
20 him in state court because now it's a state prosecution.

21 THE COURT: Well, isn't that what dual sovereignty is  
22 all about?

23 MS. STERN: Dual sovereignty is about a system of  
24 federalism where state prosecutors prosecute cases in state  
25 court and federal prosecutors prosecute cases in Federal Court,

1 not where they have it both ways and they together prosecute  
2 people in their chosen forum, whichever forum suits them at the  
3 moment.

4 THE COURT: Unless in one case one sovereign is so  
5 dominated, controlled or manipulated by the actions of the  
6 other that it does not act of its own volition. That's a  
7 pretty high standard.

8 MS. STERN: That's not the standard. This standard  
9 that -- and I don't envy Your Honor. Your Honor is -- is --

10 THE COURT: I didn't write that. That came -- that  
11 came from a Circuit decision.

12 MS. STERN: I understand. But the Circuit applying  
13 that decision probably wasn't applying the Bartkus exception.  
14 And there are different conceptions of what this exception --  
15 what the contours of this exception are and how it should  
16 apply. There is a suggestion that it's: Oh, one sovereign has  
17 to be totally controlled by the other. I don't understand why  
18 that should be the standard when they are both acting as a  
19 super-sovereign. They're not acting as separate sovereigns.

20 THE COURT: When you're on the Third Circuit, you can  
21 write that.

22 MS. STERN: Your Honor, it's all -- it's all dicta  
23 unless the Court is applying it. The only court that applied  
24 this exception is the Belcher court. And I understand  
25 Your Honor doesn't have a Third Circuit opinion applying the

1 exception, and so we're in uncharted territory.

2           But all of the cases in which the Third Circuit has  
3 analyzed this question, Berry, Piekarsky, they are plainly  
4 distinguishable on the facts. I understand Berry involved the  
5 involvement of a Special United States Attorney, and that may  
6 have been the case that Your Honor was referring to earlier.  
7 The Third Circuit is not saying, you know, involvement by a  
8 Special United States Attorney doesn't mean that we can't apply  
9 the Bartkus exception, okay? The specifics of that case were  
10 the SAUSA involved in that case was involved in the  
11 investigation of the criminal matter, then they ultimately  
12 decided the state was going to prosecute that case.

13           So the state was prosecuting that case and who was  
14 involved in the state prosecution? A District Attorney -- an  
15 Assistant District Attorney, okay? Not the same SAUSA  
16 attorney. A different person who totally handled the  
17 prosecution in state court on their own. Okay? That -- that  
18 prosecution -- I believe in that case it ultimately resulted in  
19 acquittal or for whatever reason the Federal Government was not  
20 satisfied in the result and the SAUSA who had been involved in  
21 the investigation of the matter opted to adopt the case for  
22 federal prosecution. Okay?

23           Key difference here is that SAUSA was not involved in  
24 the original state court prosecution. And that would be --  
25 that's a clearly different set of facts. That's what we have

1 here. And, unfortunately, Your Honor can't know how the  
2 Third Circuit would decide that question; but you have very  
3 unique facts here, facts that haven't been explored in the  
4 Third Circuit precedent on this question. The facts here are  
5 much stronger for applying the Bartkus exception than any of  
6 the cases that have been cited by the Government. And that's  
7 because of this really unique use of these cross designation  
8 teams in the context of both the prosecution then and today,  
9 the joint decision making about forum and the use of those  
10 cross designation teams. And then also just the enormous  
11 federal resources that went into the state matter and now the  
12 very significant state resources that are being poured into  
13 this federal matter.

14 If Your Honor has additional questions about specific  
15 issues, I'm happy to address them, but that's really all I have  
16 to present to the Court.

17 THE COURT: I'll hear from the Government at this  
18 time.

19 MS. WALKER: Thank you, Your Honor.

20 THE COURT: Miss Walker.

21 MS. WALKER: I would note initially that it is, as we  
22 agreed upon, the defense's burden to provide some *prima facie*  
23 evidence, not just suppositions as to what happened, not some  
24 interpretation of a note that occurred during a meeting, but it  
25 is their burden to prove *prima facie* evidence that there was

1 some kind of a sham prosecution in the first trial or that my  
2 presence here today is in some way controlling what the Federal  
3 Government is doing today. Frankly, I wish I had that kind of  
4 authority or power; you get paid a lot more.

5 The defense relies very heavily on the Belcher case.  
6 The Belcher case is very clearly distinguishable from what we  
7 have here today. I would note that it's also the only case in  
8 my research that I could find where the Bartkus exception was  
9 actually applied.

10 THE COURT: In mine, too. It was the -- the Belcher  
11 case was the only case that I found where Bartkus was applied.

12 MS. WALKER: Case after case after case notes that  
13 this is an extremely narrow exception. The Third Circuit  
14 courts -- the Third Circuit has twice noted that while it has  
15 recognized it, it has never actually applied the exception to  
16 any case.

17 The Belcher case was a case in which the actual DA of  
18 the county -- they refer to them as the District Attorney of  
19 the county -- was, in fact, cross designated as a SAUSA in  
20 general standards, so he had authority apparently to bring  
21 cases to the Federal Courts to get them indicted. He, in fact,  
22 drafted the presentment -- or the indictment in that case.  
23 He -- after having issues with the case in state court, he  
24 drafted the indictment, he proposed the indictment to the  
25 United States Attorney's Office, he offered to try the case.

1 He was very much involved in all of the decisions that were  
2 being made. The -- that simply isn't the case that you have  
3 here today.

4 I don't have any problem admitting that there was  
5 cooperation and joint decisions made between the two  
6 governments throughout this prosecution. But Bartkus has been  
7 recognized as sanctioning that kind of cooperation.

8 Cooperation between District Attorney's Offices and United  
9 States Attorney's Offices happen every day. Cases are reviewed  
10 often to determine which is the better sovereign to try the  
11 case. That is to avoid situations where you have trials in  
12 both cases or in both sovereigns.

13 This is the type of common cooperation that has been  
14 sanctioned by Bartkus and has been recognized as such. The  
15 Third Circuit has addressed the Bartkus exception; and although  
16 they have not applied it, they have addressed it and they did  
17 state the standard as finding it to have been a sham  
18 prosecution.

19 THE COURT: I'm sorry, you said the Third Circuit? Is  
20 that what you said?

21 MS. WALKER: Yes, yes. In Berry they -- and they used  
22 the standard in evaluating whether the Bartkus exception  
23 applied as to whether there was a sham prosecution. They also  
24 noted heavily the question of whether federal interests were  
25 established in that case and found that there were. The

1 federal interest and the state interest is the basis of the  
2 dual sovereignty issue.

3 In Berry, that investigation started when an ADA who  
4 was appointed as a SAUSA became aware of a federal cooperator,  
5 so this was involvement of federal investigators as well. The  
6 investigator in that case was a state trooper who was cross  
7 designated into a federal agency for purposes of a task force  
8 of some sort. They -- in Bartkus -- they noted that Bartkus  
9 alluded to the possibility that the prosecutions can be barred  
10 despite the dual sovereignty if it was a sham and a cover for a  
11 federal prosecution. Sham and a cover, that was the standard  
12 that they used.

13 Time and again courts have rejected the notion that  
14 the involvement of federal agents in the investigation amount  
15 to federal involvement or federal control of a case or of a  
16 state prosecution. That happened in United States versus Bimps  
17 (phonetically spelled), which was also a Third Circuit decision  
18 from 2005. You also have, in terms of the Third Circuit,  
19 Piekarsky, in which they indicated again that the prosecution's  
20 only run afoul of Bartkus if one authority is acting as a  
21 surrogate for the other or the state prosecution was merely a  
22 sham or a cover for a federal prosecution.

23 It also notes in Piekarsky that although there has  
24 been cooperation with each other in conducting the  
25 investigations and in sharing resources for interviewing

1 witnesses, that the -- that that is not sufficient to establish  
2 the dual sovereignty as evaluated in that case. Again, in  
3 United States versus Roland, the Third Circuit used the phrase  
4 the sham and a cover for the federal prosecution.

5 Going to the arguments that have been set forth,  
6 trying to state that -- I guess addressing the first trial, the  
7 trial in state court in 1997, there is a -- defense counsel  
8 relies heavily on a press release that was issued by then  
9 United States Attorney Hickton. And Mr. Hickton indicated that  
10 there had been cooperation from the time of the investigation,  
11 which is true. ATF, the city and the county as a team  
12 investigated this fire.

13 THE COURT: Which is not uncommon.

14 MS. WALKER: Which is not uncommon. And, frankly, if  
15 dual sovereignty would be based on who investigated the crime,  
16 you would never be able to have a case tried in both state and  
17 Federal Court. The outcome of that kind of a standard would be  
18 really absurd. Every time the state police brought a case, the  
19 Federal Government would not be able to prosecute; or every  
20 time a federal agency investigated --

21 THE COURT: I think that would be fair. I think the  
22 defense is arguing, though, that that's just one component.

23 MS. WALKER: It is, it is. But to say that the ATF,  
24 because they were part of the investigation, controlled the  
25 state prosecution or that it would affect the dual sovereignty

1 is just not supported by any of the case law that is out there  
2 where it indicates that the involvement of federal  
3 investigators does not amount to a Bartkus exception for dual  
4 sovereignty.

5 And with all due respect to Mr. Hickton's statement,  
6 Mr. Hickton was not the United States Attorney at that time.  
7 He was not in the room when any of these decisions were made  
8 back in 1997. The person that you heard from who was in the  
9 room was Assistant District Attorney Michael Ahwesh. You've  
10 heard testimony from him at the last hearing, Your Honor,  
11 wherein he stated the state prosecution was going forward. It  
12 went through an entire Grand Jury proceeding without any  
13 federal involvement --

14 THE COURT: What proceeding was that?

15 MS. WALKER: Grand Jury proceeding, without any  
16 involvement from the federal prosecutor's office. Of course  
17 ATF as part of the investigating team was involved. Mr. Ahwesh  
18 also noted that there was no discussion of federal prosecutors  
19 being involved until after it was determined that charges were  
20 going to be filed. The presentment was issued from the Grand  
21 Jury, which for state court purposes is the recommendation for  
22 charging. The complaints were filed by the City of Pittsburgh  
23 Police Department. And at one point Mr. Clark, who I imagine  
24 was difficult to do, acknowledged that he lacked the expertise  
25 and the knowledge to try an arson case of this magnitude and

1 involving the issues regarding the fire dynamics and the fire  
2 science --

3 THE COURT: Where was Mr. Raydoycis at the time?

4 MS. WALKER: I believe that Mr. Raydoycis was in the  
5 office at the time but was not -- I can't explain why he wasn't  
6 chosen --

7 THE COURT: Okay. Mr. Raydoycis, for the record,  
8 was -- I believe retired now.

9 MS. WALKER: He just retired maybe less than a year  
10 ago.

11 THE COURT: -- was the Deputy Assistant District  
12 Attorney that specialized in prosecution of arson cases I guess  
13 based upon his experience as the fire book chief of the McKees  
14 Rocks Voluntary Fire Department.

15 MS. WALKER: Which he is still the chief of the McKees  
16 Rocks Fire Department.

17 THE COURT: As a Stowe Rocks resident, I was aware of  
18 that.

19 MS. WALKER: Mr. Clark, however, determined that he  
20 didn't have the knowledge or the expertise to go forward on  
21 this. And discussion was had that Mr. Sweeney, who had  
22 significant expertise in the area of arson prosecutions, would  
23 be a good choice. And that's when the decision was made, was  
24 after charging, after the Grand Jury, after the presentment.  
25 It was later in the process. This wasn't the United States

1 Government controlling the state. It was the state wanting to  
2 put forth its best case and using someone with the knowledge to  
3 do so.

4 That's supported, Your Honor, by the tasks that  
5 Mr. Sweeney did during the trial. The transcripts reveal that  
6 the witnesses that he handled on the Commonwealth's  
7 case-in-chief were all fire science and financial motives  
8 related in terms of the testimony that he handled. He also  
9 handled the cross examination of the defense's fire expert.  
10 That's because he had the knowledge and the expertise in  
11 fire -- or in arson prosecutions that Mr. Clark lacked. And  
12 that is all supported by Mr. Ahwesh's testimony in that regard  
13 as to why Mr. Sweeney was brought down.

14 The -- the lack of Government -- of the Federal  
15 Government's control of the state prosecution is also borne out  
16 by the testimony of Ms. Ramaley, a Deputy District Attorney,  
17 Stephie Ramale, who testified that she handled the appeal  
18 without any contribution at all from the United States  
19 Attorney's Office. The United States Attorney's Office was in  
20 no way controlling or in no way was there a sham going on in  
21 regards to the prosecution of Gregory Brown.

22 THE COURT: So the conviction was affirmed by the  
23 Superior Court?

24 MS. WALKER: It was. And I believe that the  
25 Supreme Court denied allocatur at that point.

1 Miss Stern indicated that during the post-conviction  
2 there was federal involvement of the attorneys. None of that  
3 is substantiated by the record. There is nowhere in any of the  
4 federal habeas where the United States Attorney asked any  
5 questions or appeared on behalf of the Commonwealth or even any  
6 indication that they were in the room other than when  
7 Mr. Sweeney was called as a witness in the PCRA hearing. He  
8 testified as a witness, which is common in those proceedings.

9 The decisions that were made in regards to having me  
10 appointed for the Special Assistant United States Attorney, the  
11 part of the nol pros transcript that they don't cite to is the  
12 part where I indicated on the record that the reason I was  
13 being appointed was because we expected a quick trial and we  
14 wanted to ensure that there was no violation of any speedy  
15 trial rights. That is stated very clearly in the nol pros  
16 transcript if Your Honor would take a look at that.

17 THE COURT: Just getting back one moment,  
18 procedurally, so when the case came back from the Superior  
19 Court, then subsequently a PCRA petition was filed.

20 MS. WALKER: No. Actually, Mr. Lindsay continued to  
21 represent Mr. Brown from trial through appeal. He forewent the  
22 PCRA process and went directly to federal habeas corpus.

23 THE COURT: Oh.

24 MS. WALKER: So at that point it went to federal  
25 habeas corpus. The PCRA petition that resulted in the new

1 trial was filed significantly later.

2 THE COURT: And who filed that?

3 MS. WALKER: That was originally a pro se filing, as  
4 most are, and then the Innocence Project entered their  
5 appearance.

6 THE COURT: And that's when the Court of Common Pleas  
7 judge granted the petition.

8 MS. WALKER: Correct.

9 THE COURT: And what relief did he --

10 MS. WALKER: He granted a new trial.

11 THE COURT: A new trial.

12 MS. WALKER: Yes.

13 THE COURT: Okay.

14 MS. WALKER: So, with that, I would submit to  
15 Your Honor that the defense has not established anything other  
16 than their suppositions from a few things that they've seen in  
17 the record or seen in notes that there was any type of  
18 collusion or that the prosecution that occurred in the 1997 --  
19 that that entire two-week trial was a sham that was controlled  
20 by the Federal Government. There's nothing to support that in  
21 the record. There's nothing to support that the Commonwealth  
22 is currently controlling this or that this is somehow a sham  
23 prosecution at the behest of the Commonwealth of Pennsylvania.

24 As Your Honor noted, there are several cases that  
25 indicate that the cross designation of attorneys is not

1       indicative of a Bartkus exception. Just to cite one, I would  
2       point to United States versus Safari, which is out of the  
3       Fourth Circuit, I believe -- Fourth Circuit, yes. I would also  
4       note, Your Honor, that in terms of the Third Circuit law, there  
5       is a case of United States versus -- and I'm not going to do  
6       well with pronouncing the name -- Pungitore, P-U-N-G-I-T-O-R-E,  
7       at 910 F.2d at 1084. That is a very, very lengthy case wherein  
8       there is a footnote at Footnote 20 where the Third Circuit  
9       indicated that they -- well, initially, I should indicate that  
10      the Third Circuit rejected the argument that the federal  
11      involvement in a -- this was a RICO case, where several of the  
12      underlying offenses had been tried in both New Jersey and in  
13      Pennsylvania courts.

14           They rejected the argument of federal involvement  
15      being so intimate that it was fundamentally unfair to allow the  
16      federal prosecution to go forward. However, in Footnote 20  
17      they indicated that the degree of involvement standard using  
18      that is really an unworkable standard. In practice, they noted  
19      a bright line test based on the identity of the sovereigns as  
20      opposed to the degree of involvement may be what's necessary.  
21      They didn't announce a standard, but they did give some insight  
22      as to where they were going in terms of the Bartkus standard  
23      that they would apply.

24           So, with that, I would submit that the dual  
25      sovereignty in this case has been maintained, that both the

1 state and the Federal Government have had their own interests  
2 represented, although with cooperation with one another. It's  
3 the type of cooperation that is common and that is sanctioned  
4 under Bartkus.

5 Unless Your Honor has any questions --

6 THE COURT: I do not.

7 MS. STERN: Your Honor, may I reply briefly?

8 THE COURT: Yes, you may.

9 MS. STERN: There was quite a lot said. I think maybe  
10 some of it we'll address in our post-hearing briefing, and I'll  
11 leave it for another day. I just want to leave you with a few  
12 thoughts first regarding this -- applying this sham and cover  
13 standard in this case.

14 You know, I think in those other cases, okay, the  
15 parties -- the party asserting the Bartkus exception was at a  
16 disadvantage because they basically had to show that either a  
17 state or federal prosecution, though having all of the  
18 hallmarks of one of those prosecutions, was actually something  
19 else. Okay?

20 Here we don't have a cover. It's plain as day.  
21 They're both in Federal Court now before Your Honor, both the  
22 state and federal prosecutor. Okay? So there's no cover at  
23 all because they're both here. And they're making it very  
24 clear what's going on, that this is a joint federal and state  
25 prosecution which just so happens to be brought in Federal

1 Court. And the SAUSA designation is the only way to get a  
2 Deputy District Attorney to be able to appear before Your Honor  
3 in Federal Court.

4 THE COURT: It sounds to me like you're trying to  
5 create a new standard that's never been established in any  
6 authority that I've read. I mean -- I'm not saying your  
7 argument is not logical or frivolous, but it's not any of the  
8 standards that I read, and I read fifteen cases.

9 MS. STERN: I'm happy to supply more support for my  
10 argument about what the standard is.

11 THE COURT: I don't think it's a question of more  
12 support. I think it's a question of what the law is.

13 MS. STERN: There is definitely an open question about  
14 what the law is in this regard. But the Belcher court in  
15 applying the exception did not apply a sham and cover  
16 requirement. They acknowledged that the attorney there was  
17 acting in a super-sovereign capacity, and that's what we have  
18 here. Although, you know, I can work with that sham and cover  
19 language if I need to; I just don't think that this Court is  
20 that hamstrung by that dicta.

21 THE COURT: There were -- I read a case or two where  
22 it was -- the courts came close to arguing that there isn't  
23 even an exception; that dual sovereignty is -- you know, is so  
24 firm that there isn't even a Bartkus exception. You've seen  
25 that, some of that language.

1 MS. STERN: We've seen that language, absolutely.  
2 This is a very, very unique case.

3 THE COURT: I don't disagree with that.

4 MS. STERN: And so if it applies anywhere, it applies  
5 in this case. Second, the issue of burden, Your Honor. There  
6 was some argument about how we're just making argument based on  
7 Steve Kaufman's notes and we haven't produced anything. I just  
8 want to emphasize what's gone on with respect to this claim.

9 We have taken what were public statements from both  
10 the District Attorney's Office representatives and the US  
11 Attorney's Office representatives, and we are determining what  
12 we can from public statements from the policies of those  
13 offices and trying to determine what has gone on here. Our  
14 efforts to obtain discovery on this question were met with  
15 resistance. We were not ultimately able to get any discovery  
16 relating to these decisions back then and now today to  
17 prosecute this case in the way they have.

18 And I submit it's fundamentally unfair for them to  
19 come to court to make representations about the reasons why  
20 that prosecution was done the way it was in 1997 and is now  
21 being done today in the way it's being done while not also  
22 affording us discovery on that question.

23 They point to the testimony from two of their  
24 witnesses from the prior proceeding, Mr. Ahwesh and Miss  
25 Ramaley, to say that Mr. Sweeney's involvement was really --

1 was really limited. Those -- those witnesses didn't establish  
2 that. There's uncontroverted evidence that Mr. Sweeney  
3 co-prosecuted this case at the key -- the key relevant period  
4 of time for Your Honor to consider this issue, which is the  
5 pretrial and the trial proceedings from 1997. Who cares if his  
6 name was just on the docket for the direct appeal? It's  
7 really -- it's really beside the point. He tried this case in  
8 state court, he's trying this case now again in Federal Court.

9           And, again, there were a number of other issues that I  
10 would like to address in post-hearing briefing. There was some  
11 case citations I'm only hearing for the first time today; so  
12 given that we've agreed to do post-hearing briefing, I'll  
13 reserve the rest for that. Thank you.

14           THE COURT: All right. Very well. All right. Then  
15 I'll await your post-hearing briefing. Thirty days we agreed  
16 to?

17           MR. SWEENEY: Yes, Your Honor.

18           Could I just ask one -- so that we're going to both be  
19 submitting our findings of fact and conclusions of law at the  
20 same time. I don't know if the defense is prepared to commit  
21 to this or not; but while we're preparing it, we would like to  
22 know what their position is on which sovereign was controlling  
23 the other one at given points in time. Are you saying that the  
24 Feds were controlling the state then and the state is  
25 controlling the Feds now or what is your position? Just so

1 that we can prepare a brief that's going to address this.

2 MS. STERN: Your Honor, I propose that we file first  
3 and then they could file a responsive brief and then we could  
4 file a reply.

5 MR. SWEENEY: That's fine with me.

6 THE COURT: All right. So then 30 days.

7 MS. STERN: Yes, Your Honor.

8 THE COURT: Then how much time thereafter?

9 MR. SWEENEY: We can do it in two weeks, Your Honor.

10 THE COURT: Okay. Fifteen days, all right. All  
11 right. Thank you.

12 ALL COUNSEL: Thank you, Your Honor.

13 MS. STERN: Excuse me. I don't know if I formally  
14 admitted or moved for the admission of the documents I  
15 submitted, but I make that motion.

16 THE COURT: Okay.

17 MS. STERN: I apologize.

18 THE COURT: Your motion is granted.

19 MS. STERN: Thank you.

20 (Whereupon, the hearing was concluded.)

21 C E R T I F I C A T E  
22 I, Shirley Ann Hall, certify that the foregoing is a correct  
23 transcript for the record of proceedings in the above-titled  
matter.

24 s/Shirley Ann Hall  
25 Shirley Ann Hall, RDR, CRR  
Official Court Reporter